(13)

No. 04-563

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden, *Petitioner*,

v.

JACOBY LEE FELIX

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether two claims, both concerning statements taken by a police officer during the course of an investigation and introduced in violation of the defendant's constitutional rights during his trial, arise from the same "conduct, transaction, or occurrence" for purposes of the relation back doctrine, Rule 15(c)(2), Federal Rules of Civil Procedure?

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DENEICE A. MAYLE, Warden, *Petitioner*,

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JACOBY LEE FELIX

Respondent, Jacoby Lee Felix, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the lower court's interlocutory opinion in this case.[1]

RELEVANT REGULATORY PROVISION

Rule 15 of the Federal Rules of Civil Procedure provides, in pertinent part:

> (a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . .. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .
>
> . . . .
>
> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

[1] Respondent has no objection to Petitioner's jurisdictional statement.

STATEMENT OF THE CASE

During the course of a murder investigation, a detective from the Sacramento Police Department took two statements -- the first from Mr. Felix and the second from Kenneth Williams. (App. C6, C20.) During Mr. Felix's trial, the two statements were proffered by the prosecution, and admitted by the trial court over Mr. Felix's objection. He challenged the first statement on the ground that it was coerced in violation of the Fifth Amendment.[2] He challenged the second statement as violating the Confrontation Clause of the Sixth Amendment because Williams, although present at Mr. Felix's trial, claimed he had no memory of the statement. (App. I13-14, I20.)

Following Mr. Felix's conviction, he was sentenced to life imprisonment without the possibility of parole. On direct appeal, the state courts rejected Mr. Felix's claim that admission of Williams's statement violated his right to confront witnesses. Mr. Felix's conviction became final on August 12, 1997. (App. A5.)

On May 8, 1998, Mr. Felix filed in federal court a timely pro se petition for writ of habeas corpus that asserted the Confrontation Clause claim. *Ibid.* On May 29, 1998, the court appointed

[2] At the hearing of the pretrial suppression motion, the prosecutor acknowledged that "after a certain point in the interview, there is an express or implied promise of leniency that makes the rest of the statement beyond that point inadmissible." RT 25. But there is nothing materially different about the coercive and intimidating tactics the police used in the latter part of the interrogation than the tactics employed before that point. At trial, the prosecutor skillfully used the statements to impeach Mr. Felix's credibility, the primary factor on which his defense hinged. (App. I14-16.)

The Warden mistakenly stated that the "first time" Mr. Felix asserted the coerced confession claim was in the amended federal petition. Pet. 3. In fact, Mr. Felix first asserted the claim on May 26, 1995 in his pretrial suppression motion, CT 583, which completely belies the Warden's assertion that she lacked "fair notice of the newly-asserted claim." Pet. 14.

the Office of the Federal Defender to represent Mr. Felix. (App. H2.) On January 28, 1999, Mr. Felix filed, through counsel, an amended federal petition that included the Confrontation Clause claim asserted in the original petition and an additional claim, which alleged that the state court violated his right to due process and his privilege against self-incrimination by admitting the statements he made during the interrogation, and appellate counsel was ineffective for having failed to raise the claim on direct appeal. (App. A5.) After Mr. Felix exhausted the coerced confession claim in state court, the Warden filed her answer. (App. C6-7.)

The district court concluded that the coerced confession claim did not relate back to the filing of the initial petition because it did not arise from the "same core of facts" as the Confrontation Clause claim. It therefore dismissed the coerced confession claim on the ground that it was time-barred by the one-year statute of limitation of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(d)(1). (App. A5.)

The Court of Appeals reversed, holding that because both claims asserted that the Constitution was violated by admission of the statements at Mr. Felix's trial, they both arose from the same "conduct, transaction, or occurrence" as that term is used in Rule 15(c)(2). (App. A9.)

The court explained that Rule 15(c) should be applied literally according to its terms as it is in all other civil litigation. It concluded that the claims in this case fell comfortably within the rule because they asserted that the conviction was tainted by unconstitutional evidence introduced at the trial. The fact that the claims differed, in the sense that they were based on different legal theories, does not mean that they arise from different occurrences. (App. A6.)

It rejected the Warden's view that regards a criminal trial and conviction as a series of perhaps hundreds of individual occurrences. It also rejected the Warden's argument that the

claims in this case involved a different occurrence because Mr. Felix's statements were taken by the police more than three months before Williams's statements. This argument, the court explained, ignored the nature of Mr. Felix's habeas challenge: that the Constitution was violated by admission of the statements *at his trial*, not when the statements were taken. It therefore refused to "look beyond the events of the trial to find the 'conduct, transaction, or occurrence' that is the subject of Felix's claims." (App. A 9-10.) It dismissed the notion that its interpretation of the rule would obliterate the AEDPA's limitation period, because initial petitions would still have to be filed within the period; in fact, a contrary interpretation, one that precluded relation back of new claims, would effectively nullify the rule in habeas proceedings. Finally, it noted that any potential abuses of the relation back doctrine could be controlled by the district court under Rule 15(a), which requires leave of court to file an amendment after a responsive pleading has been filed. (App. A9.)

The Warden did not seek rehearing or suggest rehearing en banc. Instead, the Warden came directly to this Court seeking certiorari review.

ARGUMENT

I.

The Issue is Not Ripe For Review Because The Question Presented By Petitioner Is Not Raised By The Facts Of This Case And The Court of Appeals' Decision Was Proper Under Either Rule.

Respondent claims that the courts of appeals are "intractably divided" over the question presented. Pet. 7. The question framed by respondent is not, however, presented by the facts of this case; moreover, the lower court's decision was proper under either rule.

The question presented on the facts of this case is whether two claims, both concerning statements taken by a police officer during the course of an investigation and introduced in violation of the defendant's constitutional rights during his trial, arise from the same "conduct, transaction, or occurrence" for purposes of the relation back doctrine. This situation contrasts sharply with the cases cited by respondent, which fall into one or both of two categories. The first is cases in which the claims arose during different and discrete points in the litigation, for example, where one claim arose at sentencing and the other claim stemmed from trial error or appeal error.[3] The second category is cases in which different actors are alleged to have violated the petitioner's constitutional rights, for example, where one claim asserts that counsel was ineffective and the other claim challenges a trial court's ruling.[4]

Mr. Felix's coerced confession claim might well have been held to relate back even in

[3] See *United States v. Hicks*, 283 F.3d 380, 388 (CADC 2002) (refusing to relate back *Apprendi* sentencing error claim to trial claim challenging government's promise of leniency in exchange for witness's testimony on the ground that sentencing claim was "totally separate and distinct, in 'both time and type' from [the claim] raised in [the] original motion"); *United States v. Craycraft*, 167 F.3d 451, 457 (CA8 1999) (declining to relate back ineffectiveness claim based on failure to file appeal to ineffectiveness claim based on failure to advance certain arguments at sentencing); *United States v. Duffus*, 174 F.3d 333, 337 (CA3), *cert. denied*, 528 U.S. 866 (1999) (holding that claim asserting trial counsel was ineffective for failing to move to suppress evidence did not relate back to claims of ineffective assistance relating to sentencing and appeal).

[4] See *United States v. Pittman*, 209 F.3d 314, 318 (CA4 2000) (declining to relate back claim against counsel for failure to file an appeal to claims against trial judge for imposing various sentencing enhancements because it "occurred after the sentencing hearing where the court imposed the enhancements"); *McKay v. Purkett*, 255 F.3d 660, 661 (CA8 2001) (per curiam) (rejecting relation back because "the original claims challenged the conduct by the trial court in the state postconviction proceedings, whereas the amended complaint challenged the conduct of McKay's counsel prior to his conviction and sentence"); *United States v. Espinoza-Saenz*, 235 F.3d 501, 503 (CA10 2000)(refusing to relate back ineffective assistance of counsel claims to claims asserting sentencing errors); *Woodward v. Williams*, 263 F.3d 1135, 1142 (CA10 2001) (claims of ineffective assistance of counsel and juror misconduct did not relate back to claim challenging trial court's evidentiary rulings).

these circuits because it is not "totally separate and distinct, in both time and type" from his Confrontation Clause claim. Instead, both claims arise out of a discrete step in the litigation process -- his trial, and attack the same actor -- the state trial judge who admitted the unconstitutional statements into evidence.[5]

The question posed by respondent -- whether a claim relates back when it stems "from the prisoner's trial, conviction, or sentence," Pet. i, -- is simply not presented on the facts of this case. Both of Mr. Felix's claims, the Confrontation Clause claim and the coerced confession claim, arise out of his trial, not his sentence. He raised no independent claim challenging his sentence. *Cf., Ellzey v. United States*, 324 F.3d 521, 525 (CA7 2003) (new claim asserted that counsel was ineffective at sentencing for failing to raise argument based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). Respondent apparently believes the lower court's rule should be viewed as encompassing sentencing claims as well because the majority opinion "does not dispute the dissent's charge that the holding also permits relation back of any claims arising out of pre-trial motions or sentencing." Pet. 5, n.2. But there was no reason for the majority to go out of its way

[5] Only the Eleventh Circuit cases, *Davenport v. United States*, 217 F.3d 1341 (2000), *cert. denied*, 532 U.S. 907 (2001), and *Farris v. United States*, 333 F.3d 1211 (2003)(per curiam), do not fall neatly into either of the two categories, and are thus not reconcilable with the lower court's ruling in this case on the ground that the constitutional errors were committed at distinct points in the litigation or by different actors. Unlike this case, however, in both those cases the government had filed a responsive pleading before the amended motions were filed, thus requiring leave of court under Fed.R.Civ. P. 15(a). In *Farris*, the defendant filed a section 2255 motion in 1996, which the district court denied, but on four separate occasions in each of the following years, 1998, 1999, 2000, and 2001, the defendant sought to assert new claims by way of motions for reconsideration and supplemental briefing. 333 F3d at 1213; cf. *Davenport*, 217 F.3d at 1343 (movant sought to add three new claims six months after government filed responsive pleading). Given the obvious delay and abuse, the Eleventh Circuit's conclusion that the district court did not abuse its discretion in denying the request for leave to amend is easily reconciled with the result reached by the lower court in this case, where a single claim was added shortly after the limitation period had expired, prior to any responsive pleading being filed.

to dispute a charge that so plainly had no relevance to the case before it. In any event, the court emphasizes in its repeated holding (App. A7, A9, A10) and its reasoning that the "trial" is the "occurrence" that is the subject of Mr. Felix's claims:

> His coerced confession claim and Confrontation Clause claim assert that the Constitution was violated by the introduction of his confession and the witness's statement *at his trial*. Except for the use of these statements *at his trial*, Felix can state no habeas claim. We therefore reject the State's contention that we should look beyond the events *of the trial* to find the 'conduct, transaction, or occurrence' that is the subject of Felix's claims.

App. 9-10 (first emphasis in original, others added).

II.

The Issue of How the Relation Back Doctrine of Rule 15(c)(2) Operates in the Context of Federal Habeas Corpus Litigation Is Not Sufficiently Important to Justify a Place on This Court's Docket.

Even if there were a direct and irreconcilable split among the circuit courts on the question actually presented by the facts of this case, the issue is not important because it recurs so infrequently and may be reviewed in the ordinary course, if necessary, after a final judgment is entered.

For several reasons, the relation back issue simply does not recur frequently enough to make this an important question deserving of this Court's attention. First, pro se habeas petitioners often do not seek to amend their petitions; they simply reiterate the same claims raised by their attorneys on direct appeal. Amendment is generally limited to cases, such as this, where the district court appoints counsel after having determined that "the interests of justice so require,"18 U.S.C. § 3006A(a)(2), which excludes "the vast majority of federal habeas petitions." *Duncan v. Walker*, 533 U.S. 167, 191 (2001) (Breyer, J., dissenting) (noting finding of U.S.

Department of Justice study that "93% of habeas petitioners in study were pro se").[6] The fact that it took eight years for the issue to be presented as a matter of first impression in the circuit with the largest number of habeas petitions, *see* Federal Judicial Caseload Statistic, Table C-3 at 49-50 (March 31, 2004), *available at* http://www.uscourts.gov/caseload2004/tables/C03Mar04.pdf (last visited November 23, 2004), strongly supports the notion that the issue arises very infrequently.

Second, there are a number of other factors, having nothing to do with pro se status, that prevent petitioners from amending their petitions. The court might rule on the petition before there is a chance to exhaust and amend. *Walker*, 533 U.S. at 191 (dissenting opn.). Following the filing of a responsive pleading, the court might not allow amendment in its discretion. Fed.R.Civ. P. 15(a). The court might dismiss a petition that is not in proper form. R. 2(c), (e), R. Governing § 2254 Cases. Finally, the court might find that a new claim is procedurally defaulted. See *Wainwright v. Sykes*, 433 U.S. 72 (1977).

"Clearly, . . . this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893). The decision of the lower court is interlocutory; the case was remanded to the district court for a ruling on the merits of Mr. Felix's coerced confession claim. The Warden has never hinted in the course of this litigation that she would suffer extraordinary inconvenience and embarrassment by

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[6] Tellingly, while *Ellzey* and the lower court's decision have been on the books for almost 20 months and more than three months, respectively, they have been cited for the relevant point only once in a published opinion, *see Bender v. United States*, 2004 U.S. Dist. LEXIS 18014, *15 (D. Maine Sept. 9, 2004).

having to defend against the coerced confession claim. Indeed, the Warden has already filed an answer setting forth her defense on the merits. There is literally nothing further the Warden would have to do in the district court.[7] If Mr. Felix prevails in that court and the court of appeals, the Warden can then renew the question presented in a certiorari petition from the final judgment. See *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (prior denial of certiorari from interlocutory order does "not establish the law of the case or amount to *res judicata* on the points [later] raised"). If Mr. Felix does not prevail, the relation back issue becomes moot. Accordingly, if the issue is to be reviewed at all, the Court should wait for a case, perhaps this one, where certiorari is sought from a final judgment and the issue is outcome determinative.[8]

III.

The Court of Appeals' Application of Rule 15(c)(2) is Correct and Consistent With How the Rule Is Applied in Other Civil Cases.

The Warden argues that the lower court's ruling would "provide all prisoners challenging their conviction or sentences in federal habeas proceedings an advantage over all other civil litigants, for only habeas petitioners would receive the benefits of relation back for virtually any newly-asserted claim." Pet. 15. To the contrary, as the lower court emphasized, it was applying Rule 15(c)(2) as it does in all "other civil litigation," (App. A6), in its "usual, less restrictive

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[7] Neither party has requested an evidentiary hearing or expansion of the record.

[8] During the interim, the circuits whose cases the Warden relies on, which cases predate the lower court's decision and *Ellzey*, might have an opportunity to revisit the issue with the benefit of those better reasoned decisions.

manner" (App. A8), according to the "usual definition" (App. A9):

> A new "claim" will nearly always rest on a legal theory, and often on a subset of facts within the larger transaction or occurrence, that differs from those underlying the claim asserted by the original pleading. That is the reason that an amendment becomes necessary.

(App. A7.)

As Judge Easterbrook explained for the Seventh Circuit, it is those courts that disallow relation back on the ground that the petitioner seeks to raise a new theory that misconstrue how Rule 15(c) operates in civil practice:

> Courts that have declined to allow new theories to be added by amendment effectively read "conduct, transaction, or occurrence" to refer to single events in a criminal proceeding--an objection to particular evidence, each aspect of a calculation under the Sentencing Guidelines, and so on. Each step of the trial, and each legal argument, becomes a separate transaction or occurrence. Yet this is *not* how the phrase "conduct, transaction, or occurrence" is used in civil practice. That phrase sums up the "same transaction" approach to the law of preclusion (and thus to compulsory joinder): all legal issues and claims for relief arising out of a single transaction may (and often must) be raised together, and Rule 15(c) specifies that anything that would be barred, if not brought now, may be added and litigated. . . . [A]ll avenues of challenging a single sentence are one "claim" for purposes of the AEDPA--that facts rather than legal arguments define the "claim". . . . [¶] . . . A prisoner who comes up with ten different ways to contest his sentence still is litigating about a single transaction or occurrence (the supposedly unlawful sentence), so an amendment necessarily relates back under Rule 15(c)(2).

Ellzey, 324 F.3d at 525-26 (emphasis added).

This Court's decision in *Tiller v. Atlantic Coast Line R.R. Co.*, 323 U.S. 574 (1945), demonstrates that both the lower court's decision and *Ellzey* properly applied Rule 15(c)(2). In *Tiller*, the plaintiff filed a complaint following the death of her husband, seeking relief under the Federal Employers' Liability Act because the defendant failed to provide a proper lookout for the deceased, to give him proper warning of the approach of the train, to keep the head car properly lighted, and to warn the deceased of an unprecedented and unexpected change in the manner of

shifting cars. After the limitations period expired, she filed an amended complaint alleging that the defendant violated the Federal Boiler Inspection Act by failing to have a locomotive properly lighted. The Court held that the Boiler Act claim related back to the FELA claim because both claims "related to the same general conduct, transaction, and occurrence which involved the death of the deceased." *Id.* at 581. "The cause of action now," the Court explained, "as it was in the beginning, is the same -- it is a suit to recover damages for the alleged wrongful death of the deceased. . . . There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in respondent's yard." *Ibid.*

Clearly, some of the facts underlying the two claims -- whether the railroad company provided a proper lookout and whether it failed to have the locomotive properly lighted -- were different, as were the legal theories of relief. The claims nevertheless arose from the "same general conduct, transaction, and occurrence" because they both allegedly led to the "the death of the deceased." In this case, some of the facts underlying the two claims are different: the statements (by different declarants) were taken at different points during the investigation. But the claims arise from the same occurrence because they both allegedly led to the unconstitutional conviction of Mr. Felix. In other words, the "operative facts" are that the statements were both admitted into evidence at Mr. Felix's trial in violation of the Constitution. *See Chavez v. Martinez*, 538 U.S. 760, 769 (2003) ("mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness"); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) ("the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel

may ask during cross-examination"). Accordingly, there is no reason to apply a statute of limitations when the Warden has had notice from the beginning that Mr. Felix was trying to enforce a claim against her because his conviction was the result of statements admitted against him in violation of the Constitution.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Dated: November 24, 2004

Respectfully submitted,

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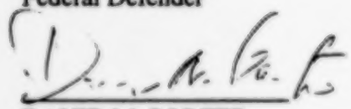
Pursuant to Rule 39 of the Rules of the United States Supreme Court, the Respondent, Jacoby Lee Felix, requests leave to file the accompanying Respondent's Brief in Opposition without prepayment of fees or costs, and to proceed in forma pauperis. Mr. Felix was appointed counsel at government expense under the Criminal Justice Act, 18 U.S.C. § 3006(a)(2)(B), by the United States District Court for the Eastern District of California on May 29, 1998.

Dated: November 24, 2004

Respectfully submitted,

QUIN DENVIR
Federal Defender



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